

BRB No. 97-1671

FLORENTINO SANTIAGO)	
)	
Claimant-Respondent)	DATE ISSUED:
)	
v.)	
)	
NEW YORK PROTECTIVE)	
COVERING)	
)	
and)	
)	
THE STATE INSURANCE FUND-NY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of
Ralph A. Romano, Administrative Law Judge, United States Department of
Labor.

James R. Campbell, Glen Cove, New York, for claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey, for
employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, NELSON,
Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (92-LHC-1315) of Administrative Law Judge Ralph A. Romano rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This case is before the Board for a second time. Claimant injured his left shoulder and lower back on June 6, 1985, during the course of his employment, when he was struck by a piece of metal, and fell. In his original Decision and Order, the administrative law judge found that although claimant cannot return to his usual job with employer, employer established the availability of suitable alternate employment. The administrative law judge awarded claimant temporary total disability benefits from June 7, 1985, through August 15, 1989, and temporary partial disability benefits thereafter based on a post-injury wage-earning capacity of \$210 per week.

Claimant appealed the administrative law judge's decision, contending that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. The Board vacated the administrative law judge's finding that employer established the availability of suitable alternate employment, holding that it was premised upon an erroneous evaluation of the medical evidence of record. Thus, the Board remanded the case for further consideration by the administrative law judge. *Santiago v. New York Protective Covering*, BRB No. 93-1586 (August 22, 1996).

On remand, the administrative law judge compared the exertional requirements of the alternate position in promotional work with claimant's medical restrictions and again concluded that claimant was physically capable of performing this job, and thus that employer established the availability of suitable alternate employment. Consequently, the administrative law judge again awarded claimant continuing temporary partial disability benefits from August 15, 1989.¹ Subsequently, the administrative law judge issued a Supplemental Decision and Order Awarding Attorney Fees awarding claimant's counsel a fee in the amount of \$4,125, representing 16.5 hours of legal services performed before the administrative law judge on remand at the hourly rate of \$250, payable by employer.

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees, contending that it cannot be held liable for a fee to claimant's counsel for work performed before the administrative law judge on remand, as additional benefits were not obtained. Claimant's counsel responds, urging affirmance of the administrative law judge decision, or alternatively, requests the fee be assessed against claimant as a lien against his compensation.

We agree that the administrative law judge's award of an attorney's fee against employer for work performed on remand cannot be affirmed in this case. Under Section 28(b) of the Act, employer will be liable for an attorney's fee only if the claimant succeeds in obtaining greater compensation than that paid or tendered by the employer. 33 U.S.C. §928(b); *see Krause v. Bethlehem Steel Corp.*, 29 BRBS 65 (1992). In this case, the administrative law judge issued a Decision and Order on April 1, 1993, awarding claimant

¹We note that, pursuant to Section 8(e) of the Act, 33 U.S.C. §908(e), benefits for a temporary partial disability shall not be paid for more than five years.

temporary total disability benefits from June 7, 1985, through August 15, 1989, and temporary partial disability benefits thereafter. It is undisputed that employer began paying benefits in the amount ordered by the administrative law judge from the date of the issuance of the Decision and Order. On remand from the Board, the administrative law judge reaffirmed his finding that employer established the availability of suitable alternate employment and that claimant is entitled to temporary partial, not total, disability benefits. Thus, claimant was not successful in obtaining additional compensation through the proceedings on remand. Consequently, we reverse the administrative law judge's award assessing an attorney's fee against employer for services performed on remand.

With regard to the fee for services performed on remand, claimant may be liable for an attorney's fee pursuant to Section 28(c), 33 U.S.C. §928(c). The case, therefore, must be remanded for the administrative law judge to consider whether the fees incurred on remand, which cannot be assessed against employer pursuant to Section 28(a) or (b), 33 U.S.C. §928(a), (b), should be assessed against claimant as a lien upon his compensation award pursuant to Section 28(c). Under such circumstances, the administrative law judge must take into account claimant's financial circumstances. *See* 20 C.F.R. §702.105.

Accordingly, the Supplemental Decision and Order Awarding Attorney Fees is reversed. The case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge